Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers	)	WC Docket No. 03-251

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

I. INTRODUCTION

The National Association of State Utility Consumer Advocates ("NASUCA")[1] submits these reply comments in response to comments filed on the Federal Communications Commission's ("FCC" or "Commission") Notice of Inquiry ("NOI") in the above-captioned proceeding. Like NASUCA's initial comments, these reply comments focus on the anti-competitive, anti-consumer consequences when providers of telecommunications services bundle their legacy services with new services, and "tie" such services together so that the new services are not available on a standalone basis without purchase of the legacy services.

[1] NASUCA is a voluntary association of 43 advocate offices in 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

NASUCA notes that the majority of the comments filed in response to the NOI actually address the FCC's decision in the March 25, 2005 Memorandum Opinion and Order ("MO&O") in this proceeding. The MO&O held that "[a] state commission may not require an incumbent local exchange carrier (LEC) to provide digital subscriber line (DSL) service to an end user customer over the same unbundled network element (UNE) loop facility that a competitive LEC uses to provide voice services to that end user."[2] Predictably, the incumbent LECs ("ILECs") are pleased with the Commission's decision, because it means the ILECs do not need to share their networks.

On the other hand, consumer groups and non-ILEC broadband providers believe the issue was wrongly decided. NASUCA agrees with the Texas Office of Public Utility Counsel ("TOPC") that competition is harmed when "[a] provider that does not yet dominate a relatively new service (DSL service) compels residential and small business customers to also purchase a 'universal service' for which the provider exercises overwhelming dominance (local telephone service)."[3] The Commission's decision in the MO&O has harmed competition and narrowed consumer choice.

II. THE COMMISSION SHOULD PERMIT STATE OVERSIGHT OF "TYING" ARRANGEMENTS

NASUCA agrees with Comcast that the term "bundling" is an imprecise description of the subject "tying" arrangements.[4] "Bundling" suggests an economical and optional package of services for the consumer. However, the mandatory tying of local service and broadband is

[2] MO&O at 1.

[3] TOPC Comments at 2.

[4] Comcast Comments at 5.

specifically designed to limit consumer choice and block potential basic service competition. NASUCA also agrees with Comcast's proposal that such "tying" arrangements should be examined in "fact-specific proceedings" unique to the markets where the tying is occurring.[5] Qwest also argues that rules of "general applicability" regarding bundling should be avoided, and NASUCA concurs.[6]

As NASUCA stated in the initial comments, states are the proper arbiters of market conditions, including what does and does not constitute an improper or unreasonable tying arrangement under the existing competitive situation in the state.[7] ILECs' market share of wireline voice service is likely to increase once again with the unavailability of the unbundled network element platform ("UNE-P") in 2006.[8] The increase in market share may vary from state-to-state and the FCC is not properly situated to determine when beneficial bundling arrangements morph into improper "tying" arrangements. The states are ideally equipped to make these granular public policy decisions.

III. CONCLUSION

Unfortunately, the Commission's preliminary decision in the MO&O to preempt the states while ignoring the dominance of the ILECs in the provision of traditional wireline service has made ILECs' tying of voice and advanced services much more likely. The comments responding to the NOI in the current docket have generally reargued the decision reached by the Commission in its MO&O.

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[5] Id. at 5-6.

[6] Qwest Comments at 1.

[7] NASUCA Comments at 5.

[8] TOPC Comments at 2.

The Commission specifically reserved judgment about whether its preliminary decision should stand in view of the potential harm from inappropriate tying arrangements. NASUCA trusts that the Commission will now recognize that it should reverse its preliminary decision, because the harm to consumer choice and an already weakened competitive market outweighs any benefit that could result from allowing such tying arrangements. States are better situated than the Commission to determine the reasonableness of such tying arrangements. Thus, the Commission should defer to the states to determine when the bundling of legacy and enhanced services become problematic.

Respectfully submitted,

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